STATE OF MICHIGAN

IN THE SUPREME COURT
FROM THE MICHIGAN COURT OF APPEALS

MICHAEL LIND,

Plaintiff-Appellant,

-v-

CITY OF BATTLE CREEK,

Defendant-Appellee.

/

Supreme Court No: 122054
Ct. of Appeals No: 227874
Calhoun Co. Cir Ct: 98-005111-CL

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PLAINTIFF-APPELLANT'S REPLY TO APPELLEE'S RESPONSE BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

PAGE

INTRODUCTION

Pursuant to MCR 7.306 and MCR 7.309, the Appellant, Michael Lind, files his Reply Brief. The Appellee-Defendant, City of Battle Creek ("City"), has asserted a number of arguments in its Appellee Brief in an effort to defend the proposition that certain citizens in Michigan should be subject to a higher standard to prove civil rights violations because of their race and gender. Further, the Appellee asserts a number of specious arguments in an effort to elevate a subjective employment decision to the level of undisputed fact to justify summary disposition in the face of multitudinous disputed issues of fact.

Only some of these arguments merit rejoinder within the confines of a reply brief. First, the Appellee's effort to defend the *background circumstances test* for reverse discrimination cases is simply indefensible in light of the plain language of the Michigan Civil Rights Statute, in light of *Venable v General Motors Corp* (on remand), 253 Mich App 473; 656 NW2d 188 (2002), and, further, in light of the recent United States Supreme Court decisions involving the University of Michigan. Secondly, the Appellee's subjective explanations of "maturity" and "sense of service" should not serve as a basis for summary disposition.

ARGUMENT

I. THE BACKGROUND CIRCUMSTANCES TEST IS INVALID

A. *The Background Circumstances Test Violates the Civil Rights Act*

The *background circumstances test* is legally invalid. The *background circumstances test* makes it more difficult for a Caucasian male plaintiff employee than for other plaintiff employees of different races and gender to allege employment discrimination under Michigan's Civil Rights Act ("CRA"). *Venable v General Motors Corp* (on remand), 253 Mich App 473; 656 NW2d 188 (2002). In the *Venable* decision, the Court of Appeals rightly observed that the

CRA makes no distinction concerning whether an employee alleging race discrimination is Caucasian, African-American or any other race or ethnic origin. The *Venable* court properly concluded that the *background circumstances test* was inconsistent with the CRA and, therefore, must be found invalid.

The Appellee has not articulated any reason to ignore the *Venable* decision. The fact that some federal courts still cling to "background circumstances," even though others have rejected it, is insufficient reason to ignore the Court of Appeals' recent decision in *Venable.*

As contemplated by the express language of Elliott-Larsen, all races should enjoy the same burden of proof under the CRA. The controversy pertaining to the *background circumstances test* still plagues the Court of Appeals. *See e.g. Kupel v General Motors*, Appellate No. 236781 (unpublished, June 17, 2003)[1] (the Court of Appeals noted the conflict between *Venable* and *Allen v Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997)). This Court should adopt the *Venable* ruling that the "background circumstances" standard conflicts with the CRA.

B. ***The Background Circumstances Test Violates the Constitutional Guarantee of Equal Protection***

Even if it can be argued that the *background circumstances test* is consistent with the Michigan CRA, it is inconsistent with the United States' and Michigan's Equal Protection Clauses. This conclusion is made even more apparent by the recent United States Supreme Court decisions involving the University of Michigan, *Gutter v Bollinger*, ___ Sup Ct ___; 71 USLW 4498; 2003 WL 21434002 (US June 23, 2003) and *Gratz v Bollinger*, ___ Sup Ct ___; 71 USLW 4480; 2003 WL 21434002 (June 23, 2003). Both cases involved an equal protection challenge to the University of Michigan's admission policies for its Law School and

[1] A copy is attached to this Reply Brief.

Undergraduate programs, which gave special consideration to minority students in order to achieve diversity.

In both cases, the United States Supreme Court applied the highest level of judicial scrutiny since the affirmative action admission policies dealt with racial preferences. This meant that the University of Michigan had to show a compelling governmental interest and, even if it could show a compelling governmental interest, then the University had to demonstrate that the means selected to achieve the governmental interest must be the least restrictive means and be narrowly tailored to accomplish the objective. (See Justice O'Connor's majority opinion in *Gutter*.

In the *Gutter* case, which involved admission to the law school, a majority of the Supreme Court ruled that the University satisfied both legal thresholds. Racial diversity in a post-graduate student body was a compelling governmental interest. Because the law school conducted a careful, individualized analysis of the criteria relating to admission to the University of Michigan Law School and because race was one of several factors considered and then only as a plus factor, the law school satisfied the careful, individualized, least restrictive means test.

On the other hand, in *Gratz*, a six member majority of the United States Supreme Court ruled that the undergraduate admissions program failed the highest level of judicial scrutiny test. In the case of the undergraduate admissions program, the University of Michigan automatically assigned a 20 point advantage to racial minority applications for admission which white candidates did not receive. Because this method was not narrowly tailored, it violated the least restrictive means requirement for achieving the governmental goal of diversity.

The University of Michigan cases underscore the constitutional infirmity of the *background circumstances test*. First, the *background circumstances test* operates as a negative

rather than a plus factor.[2] As observed by the Michigan Court of Appeals in the *Venable* decision, the *background circumstances test* burdens white male victims of discrimination. On that basis alone, it should be found violative of equal protection.

In any event, the Appellee completely failed to articulate any governmental interest which justifies imposing a greater standard of proof on one group of plaintiffs because of their race. The Appellee cites to historical factors relating to discrimination, but broad generalities are inimical to equal protection analysis. Generalized categories, as opposed to individual preservation of personal rights, violate the Equal Protection Clause. No governmental interest is served by increasing the burden of proof on one group of employees because of their race.

Lastly, even if some governmental interest could be articulated, which it has not, the Appellee has not shown that the *background circumstances standard* operates as the least restrictive means in achieving whatever governmental interest is at stake. The *background circumstances test* treats all discrimination cases involving white male employees the same. These victims of civil rights violations have to prove an extra element in order to maintain a claim under Michigan law. There is a very easy mechanism for evaluating cases on an individual basis. The solution is straightforward and readily available - all claims should be subjected to the same standard of proof as a *prima facie* case. Those cases which have no merit will be sorted as a matter of course in the litigation process.

Therefore, the Appellee has failed to assert any reason for clinging to this discredited legal standard of background circumstances. The decision granting summary disposition against Michael Lind, both at the trial court and Court of Appeals level, relied heavily on the background

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[2] In her dissenting opinion in *Gratz*, Justice Ginsberg would have upheld the 20 point advantage, but even Justice Ginsberg would not sustain a negative factor based on race. She wrote in her opinion: "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race." (Justice Ginsberg dissenting opinion, *Gratz*).

circumstances element. For this reason alone, the lower Court's decision should be reversed and the case remanded back for trial on the merits.

II. DISPUTED ISSUES OF FACT EXIST CONCERNING APPELLEE'S LEGITIMATE, NONDISCRIMINATORY REASON

The Appellee argues that there is no issue of material fact regarding its legitimate, nondiscriminatory reason. The Appellee justifies its promotion decision based on the contention that the candidate selected was more mature and had a "greater sense of service" than Michael Lind.

The City cannot cite any objective factors to support its decision. In fact, all of the objective criteria indicate that Michael Lind should have been selected. Michael Lind scored higher on the objective test for sergeant and had a college education, while the selected candidate did not (132a). Appellant Michael Lind received 17 unit citations for excellent police work and, on seven different occasions, was singled out for his excellent police work (46-52a).

Essentially, the Appellee wants to rebut Michael Lind's prima facie case based totally on subjective criteria. Maturity and sense of service rest totally on subjective judgment. There is no way to quantify maturity and sense of service. These nebulous factors are synonymous with "bad attitude" or right person for the job. In his Appellant's Brief, Michael Lind cited to *Iadimarco v Runyon*, 190 F3d 151 (CA 3, 1999) as one example in which a court, in this case federal court, cautioned against using subjective criteria for rebutting a prima facie case. A belief that "the individual selected is the right person for the job," without more is not a race neutral explanation at all. Allowing a subjective factor to rebut a prima facie case of discrimination is "tantamount to a judicial repeal of the very protections Congress intended under Title VII." *Id.* at 166.

The United States Supreme Court in *Texas Dept of Community Affairs v Burdine*, 450 US 248 (1981), warned about using subjective criteria to rebut a prima facie case of discrimination. In that case, the Supreme Court stated that the articulated reasons must be "clear and specific" to rebut the prima facie case and guarantee that a plaintiff will be afforded a "full and fair opportunity" to demonstrate pretext. 450 US at 253-256.

It is true that subjective employment evaluations are not illegal per se. However, it must be remembered that the subject case was decided on summary disposition grounds. Subjective employment decisions should not rebut a prima facie case, especially where there is no back-up objective criteria supporting the employment decision, and especially in this case where all of the objective indications favor the Plaintiff-Appellant.

Even if it the subjective criteria of maturity and greater sense of service qualify as a legitimate, nondiscriminatory reason for the purposes of summary disposition, Michael Lind has submitted substantial evidence demonstrating that this explanation is a pretext. The Appellee claims that, to prove a pretext, Michael Lind must show that (1) Defendant's reasons had no basis in fact; (2) the reasons did not actually motivate the decision; or (3) the reasons were insufficient to warrant the decision. *Manzer v Diamond Shamrock Chemicals Company*, 29 F3d 1078, 1084 (CA 6, 1994).

Appellant Michael Lind submitted evidence satisfying each of these three elements. First, the explanation regarding Michael Lind's maturity and sense of service are subjective comments which have no basis in fact. The facts establish that Michael Lind had a very deep sense of service as vividly illustrated by the numerous commendations he received for his police work, which he continued to receive up through the time he was applying for the promotion. (46-52a). His evaluations reflected no deficiency in his maturity or sense of service. In fact, in

the category entitled "attitude," the Appellee consistently rated Michael Lind as good. (89-94a). In addition, when Michael Lind requested an explanation as to why he had been passed over for a promotion, the City's decision maker did not offer any reason remotely touching on a question of maturity or lack of service to the department. (188a).

Further, Michael Lind submitted evidence that the reasons did not actually motivate the decision. The City kept shifting its explanation. At one time it was maturity, at another it was Michael Lind's expunged disciplinary record, and at another time it was both. Now, the Appellee clings to the fiction that it did not really rely on the expunged disciplinary record of Michael Lind even though the Appellee injected this issue at the hearing on its Motion for Summary Disposition. (112-113a).

Indeed, Michael Lind submitted evidence showing that another African-American candidate, who was promoted over him was, in fact, disciplined for a more egregious matter - domestic abuse. Yet the City still promoted this candidate, Ray Felix. Domestic abuse does not exactly epitomize the virtue of maturity. If maturity was really a superceding factor, then a jury is entitled to consider why the City would promote a candidate who was guilty of domestic abuse. In addition, Michael Lind submitted direct and circumstantial evidence that the decision makers in his case were motivated to promote other candidates on the basis of their race. These facts ought to raise a question of fact.

In light of the evidence submitted to rebut summary disposition, the City's explanation strains credibility. As stated above, subjective criteria should be held suspect, especially in the absence of any objective criteria supporting the decision. The United States Supreme Court in *Reeves v Sanderson Plumbing Products, Inc*, 530 US 133 (2000) ruled that circumstances relating to an employer's explanation constituted an independent basis for establishing a prima

facie case. Rejection of an employer's explanation permits a trier of fact to infer the ultimate conclusion of intentional discrimination.

CONCLUSION

Summary disposition still remains the wrong decision. The *background circumstances test* violates both the Michigan Civil Rights Act and the United States and Michigan's Constitution. There are substantial questions of fact which defeat summary disposition on the issue of the City's use of subjective criteria which was a pretext for discrimination.

The Appellee cites to a historical anecdote of Ulysses S. Grant being promoted over more qualified generals as illustrating that the person who may not be the most qualified may still be successful. This statement is historical revisionism. In the first place, Grant's military experience obtained for him the immediate commission of colonel at the outset of the war. By the time he was promoted to lieutenant-general by President Abraham Lincoln, Grant had proven himself the most able Union commander on the field, with a string of victories from Fort Henry, Fort Donelson, Shiloh, a brilliant campaign at Vicksburg and Missionary Ridge at Chattanooga, Tennessee.[3]

Perhaps a more appropriate historical antecedent would be the case of Robert E. Lee. At the beginning of the Civil War, Robert E. Lee had compiled, from all objective measures, an excellent record of military service which included ranking second in his class at West Point, stellar performance in service under General Scott in the Mexican War and an excellent record on the western frontier in Texas. Because of his exemplary record, President Abraham Lincoln offered him a command in the Union armies, which General Lee declined. Instead, General Lee eventually became the commander of the Army of Northern Virginia which gave President

[3] Grant, *The Personal Memories of Ulysses S. Grant*, Vol. I (1885).

Abraham Lincoln and his Union generals fits and in the battle of the Wilderness drove General Grant to a nervous breakdown and tears. General Grant was only able to subdue Army of Northern Virginia with overwhelming force and only after sustaining appalling casualty rates.[4]

The price of opportunity is too precious to base on shades of skin pigment. For the above reasons, the Appellant, Michael Lind, respectfully requests that the Court reverse the decision of the Court of Appeals and of the trial court and that it remand this case for trial on the merits.

Respectfully submitted,

ROBERTS, BETZ & BLOSS

Dated: July 10, 2003.

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[4] Foote, *The Civil War*, Vol. III, pp 185-186 (1974).

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

George KUPEL and Marianne Kupel, Plaintiffs-Appellants, [FN1]

FN1. Plaintiff, Helena Nawrat, settled during case evaluation.

v.

GENERAL MOTORS and Mary Ann Hergt, Defendants-Appellees. [FN2]

FN2. Defendants, Knight Facilities Management-GM, Inc., Liz Howard, Yvonne Wells and Robin Roberts, settled during case evaluation.

No. 236781.

June 17, 2003.

Before: SAAD, P.J., and ZAHRA and SCHUETTE, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiffs appeal as of right from an opinion and order granting defendant General Motors' motion for summary disposition on plaintiff's claims of reverse racial discrimination, retaliation, and a hostile work environment under the Michigan Civil Rights Act, M.C.L. § 37.2202 *et seq*. We affirm.

I. Facts

The facts and circumstances of this case pertain to employment relationships and working conditions at a General Motors (GM) facility. Plaintiffs George and Marianne Kupel are caucasian of east European descent and have worked at GM in janitorial services for 36 years and 29 years, respectively. In essence, plaintiffs assert that agents of former co-defendant Knight Facilities Management-GM, Inc. (a subcontractor of General Motors), a minority-owned and operated company, mistreated white employees such as plaintiffs because of their race.

GM contracted out certain supervisory responsibility of its janitorial services to Knight Facilities. Plaintiffs contend they were treated poorly on the job, assigned different and more difficult tasks than other co-workers, were unfairly disciplined and were victims of a false rumor that plaintiffs were circulating a

petition alleging racial discrimination by a supervisor.

On July 31, 2001, the trial court granted defendants' motion for summary disposition. The trial court's opinion stated that: a defendant supervisor's remark about "foreigners" was directed toward a third party and was not directed to plaintiff Marianne Kupel; plaintiff Marianne Kupel admitted that no co-worker made derogatory comments concerning plaintiffs' national origin; plaintiff George Kupel's failure to contact security after an isolated comment about "watch your back" was indicative that he did not fear for his physical safety; disciplining plaintiff George Kupel was not retaliatory in nature and he received lost compensation; and, plaintiff failed to establish grounds tantamount to a reverse discrimination claim.

II. Standard of Review

A trial court's grant or denial of a motion for summary disposition is reviewed de novo on appeal. *Spiek v. DOT*, 456 Mich. 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* Summary disposition is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, deposition, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie- Gamester v. City of Berkley*, 461 Mich. 73, 76; 597 NW2d 517 (1999).

III. Analysis

A. Reverse Discrimination Claim Pursuant to the Michigan Civil Rights Act

Under the Michigan Civil Rights Act, an employer may not discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion, race, color, national origin, age, sex, height, weight or marital status. MCL 37.2202(1)(a); *Wilcoxon v. 3M*, 235 Mich.App 347, 358; 597 NW2d 250 (1999).

***2** A plaintiff may establish a claim that his employer discriminated against him in violation of the Civil Rights Act by the presentation of direct or indirect evidence, or by the presentation of a prima facie claim. *Wilcoxon, supra*, 235 Mich.App 358-359. In order to establish a prima facie claim of employment discrimination, a plaintiff must show that he or she suffered an adverse employment action under circumstances which give rise to an inference of discrimination. *Wilcoxon, supra*, 235 Mich.App 361. A plaintiff must show that: (1) he or she was a member of a protected class; (2) he or she was subject to an adverse employment action; (3) he or she was qualified for the position; and (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Smith v Goodwill Indus of W Mich, Inc*, 243 Mich.App 438, 447-448; 622 NW2d 337 (2000). If a prima facie claim is established, the employer then bears the burden of showing a legitimate, nondiscriminatory reason for the adverse employment action. *Wilcoxon, supra*, 235 Mich.App 361. If the employer does so, the plaintiff has the burden to prove that the stated reason was merely pretextual. *Id.*

A reverse discrimination plaintiff who has no direct evidence of discriminatory

intent may establish a prima facie claim of discrimination by showing background circumstances supporting the suspicion that defendant is that unusual employer who discriminates against the majority. *Allen v. Comprehensive Health Servs*, 222 Mich.App 426, 433; 564 NW2d 914 (1997). But see *Venable v. General Motors*, 253 Mich.App 473, 480; 656 NW2d 188 (2002) (a plurality opinion rejecting the requirement that the plaintiff present in a reverse discrimination lawsuit evidence that the defendant is the rare employer who discriminates against the majority).

For an employment action to be an adverse employment action, the action must have been materially adverse in that it involved more than inconvenience or an alteration of job responsibilities, and there must have been some objective basis for demonstrating that the change was adverse. *Wilcoxon, supra*, 235 Mich.App 362-363.

Here, plaintiffs have failed to establish a reverse discrimination claim. The trial court noted that a statement allegedly made by a supervisor of plaintiffs, that she "did not like foreigners because they come to this country and get everything," was an isolated, stray remark. In determining the admissibility of a stray remark, a court must consider whether the remark: (1) was made by a decision maker or by a person uninvolved in the challenged decision; (2) was isolated or part of a pattern of biased comments; (3) was made near or remote in time to the challenged decision; and (4) was ambiguous or clearly reflected discriminatory bias. *Krohn v Sedgwick James of Mich, Inc*, 244 Mich.App 289, 297; 624 NW2d 212 (2001). Here, plaintiff Marianne Kupel acknowledged that this comment was not directed to her and was allegedly made when the supervisor was turned down when applying for welfare. We therefore conclude the trial court properly found the supervisor's comments to be insufficient as a matter of law to sustain plaintiffs' claim of reverse discrimination.

*3 The remainder of the incidents plaintiffs allege in their complaint fail to meet the requirements of reverse discrimination set forth in *Wilcoxon, supra*. Plaintiffs' complaint that co-workers did not return to work to assist them to finish waxing the floor and plaintiffs' complaint that they were required to complete a job in two hours as opposed to other workers allegedly taking eight hours do not establish adverse employment actions against plaintiffs. Plaintiffs suffered no economic harm as a result of this alleged wrongful conduct. Courts have no authority under the Civil Rights Act to police employee productivity or insure that employers efficiently manage their workforce. An adverse employment action will only be found where there is a significant change in employment status, such as "firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc v. Ellerth*, 524 U.S. 742, 761; 118 S Ct 2257; 141L.Ed.2d 633 (1998). Where, as here, the alleged wrongful conduct does not impact the economic status or employment standing of the employee, we cannot review an employer's management style in search of an adverse employment action.

Plaintiff, George Kupel, also argues that his claim of discrimination is supported by the fact that he was wrongfully disciplined for not cleaning a restroom. However, this isolated disciplinary action is insufficient to sustain plaintiffs' claim of reverse discrimination as a matter of law. An isolated act by an employer that is subsequently remedied by a grievance process does not amount to an adverse employment action under the Civil Rights Act. See *Dobbs-Weinstein v.*

Vanderbilt Univ, 185 F 3d 542 (CA 6, 1999). "To rule otherwise would encourage litigation before an employer has an opportunity to correct through internal grievance procedures any wrong it may have committed." *Id.* at 546. Plaintiff prevailed on his grievance and his lost pay was fully recovered. Therefore, plaintiff suffered no adverse economic consequence from defendant's act of improvidently imposing discipline upon plaintiff.

Additionally, plaintiffs argue that, according to the daily overtime sheets, they were discriminated against because they were denied equal overtime. However, the daily overtime sheets did not reveal which employees had work restrictions. Plaintiff Marianne Kupel had medical restrictions that limited the type of overtime jobs she could perform. Therefore, plaintiff MaryAnn Kupel failed to establish that she was similarly situated to non-protected persons who were assigned overtime. Plaintiff George Krupel's claim based on the denial of overtime fares no better. Were we to assume that he established a prima facie claim relating to the denial of overtime, he nonetheless failed to overcome the legitimate non-discriminatory reason offered by defendant to support the overtime assignments. Defendant maintained overtime was assigned on the basis of employee expertise. Pretext may be established by demonstrating that consideration of a protected characteristic was a motivating factor and made a difference in the contested employment decision. *Hazle v. Ford Motor Co*, 464 Mich. 456, 462-467; 628 NW2d 515 (2000). However, the soundness of the employer's business judgment may not be scrutinized as a means of showing pretext. *Meager v. Wayne State Univ*, 222 Mich.App 700; 565 NW2d 401 (1997). Plaintiffs argue the merits of defendant's business judgment and fail to present evidence that would support the conclusion that defendant's proffered method of assigning overtime is pretextual.

B. Retaliataion Claim Pursuant to the Michigan Civil Rights Act

***4** In *Meyer v. City of Center Line*, 242 Mich.App 560; 619 NW2d 182 (2000), this Court noted that to establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Id.* at 568-569. An adverse employment action (1) must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff. *Id.*

Here, plaintiffs have failed to present sufficient evidence to support their retaliation claim. As discussed previously, plaintiffs could not show that they were subjected to any adverse employment actions. Any actions taken against plaintiffs were no more than mere inconveniences or alterations of job responsibilities. Plaintiffs argue that Liz Howard, plaintiffs' supervisor, wrote up plaintiff George Kupel after he and his wife left early for lunch to make complaints to the General Motors Labor Relations Department. However, plaintiff George Kupel admitted in his deposition that Howard saw plaintiffs leaving early for lunch without permission, and that they were supposed to ask permission from their supervisor to leave early. The trial court determined that plaintiffs were written up not because they were going to make a complaint, but because they left early without permission. While it is evident there was a certain amount of on the job tension and employment conflict between and among plaintiffs and their

supervisors, this conduct does not meet the threshold of a retaliation claim under the Michigan Civil Rights Act. We find that the trial court did not err in granting summary disposition on plaintiffs' retaliation claim.

C. Hostile Work Environment Claim Pursuant to the Michigan Civil Rights Act

A hostile work environment claim is actionable if plaintiffs establish: (1) they belonged to a protected group; (2) they were subjected to unwelcome conduct on the basis of their protected status; (3) the unwelcome conduct was intended to interfere with plaintiffs' employment or to create an intimidating, hostile or offensive work environment; and (4) respondeat superior. *Radtke v. Everett*, 442 Mich. 368, 372; 501 NW2d 155 (1993). Plaintiffs failed to establish the second and third elements identified above.

Plaintiff contends that the comment "watch your back" from co-worker Rick Jones created an atmosphere "of danger and hostility ." Aside from the alleged threat that plaintiff, George Kupel, was told to "watch his back," plaintiffs failed to establish evidence of a hostile or intimidating environment. Plaintiffs worked with Jones the remainder of the shift and testified that they did not have any problems after that one incident. Additionally, plaintiff George Kupel apparently did not feel the need to call security because of Jones' remark. Further, Jones allegedly made this comment because of a dispute over whether George Kupel should have assisted Jones in completing his work duties. Thus, there is no evidence the comment was a result of George Kupel's status as a Caucasian of eastern European descent. The trial court did not err in granting summary disposition on plaintiffs' hostile environment claim.

D. Case Evaluation Award

***5** Plaintiffs also argue that the trial court abused its discretion by refusing to reinstate defendant, Mary Ann Hergt, after plaintiffs inadvertently accepted a "zero" case evaluation award against her in the course of accepting monetary awards against each of the other defendants. We need not address this issue, because we conclude the trial court properly dismissed plaintiffs' claims pursuant to MCR 2.116(C)(10). Were we to conclude the trial court abused its discretion by failing to set aside plaintiffs' acceptance of the mediation evaluation [FN3] as to defendant Hergt, she would nonetheless be entitled to summary disposition for the reasons supporting summary disposition in favor of defendant General Motors.

FN3. Pursuant to MCR 2.403, the mediation process is now referred to as case evaluation.

IV. Conclusion

In summary, plaintiff failed to establish claims under the Michigan Civil Rights Act for reverse discrimination, retaliation, or hostile work environment.

Affirmed.

SAAD, P.J. (concurring).

SAAD, J.

I concur in the result only because plaintiffs here complaint that a "minority" owned and operated business discriminated against "majority" employees, thus rendering inapplicable and counterintuitive, the "unusual employer" doctrine referenced by the majority's opinion. Regardless of the merits of the doctrine, it simply has no place in our analysis when a "majority" employee complains of discriminatory conduct by a "minority" owned employer.

In all other respects, I concur with the majority opinion.

2003 WL 21398292 (Mich.App.)

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